



## MONTGOMERY COUNTY ETHICS COMMISSION

Nina Weisbroth  
*Chair*

Stuart D. Rick  
*Vice Chair*

August 1, 2012

Advisory Opinion 12-07-010

You are a member of a Montgomery County Board, Committee or Commission (“the BCC”). You have inquired whether you are permitted to apply for a vacant staff position that the BCC itself selects; whether it is sufficient for you to recuse yourself from the hiring process; or whether you would be required to withdraw from the BCC altogether in order to apply for the vacant position. At the outset, the Commission appreciates your contacting the Commission about the propriety of your applying for the staff position at the BCC and your assistance in the developing of the factual record for this advisory opinion.

By framing your inquiry around whether you are permitted to apply for the vacant position and the sufficiency of recusal, you presume, correctly, that you could not participate as a member of the BCC in the selection process to fill a position you would be applying for. In terms of Montgomery County’s Public Ethics Law, it would be a misuse of prestige of office under § 19-14(a) for you to participate as a member of the BCC in the selection process under those circumstances.<sup>1</sup> Such an action would also be contrary to the intent of the Public Ethics Law’s conflict of interest provisions that, among other things, are aimed at preventing public employees from taking actions for their own benefit.

Your letter indicates that “Preliminarily, the [BCC] determined that the Class Specification for the Executive Director position is outdated and does not accurately

---

<sup>1</sup> Section 19A-14(d)(1) states: “A public employee must not appoint, hire, or advocate the advancement of a relative to a position that is under the jurisdiction or control of the public employee.” While, this provision does not expressly address an employee’s involvement in hiring himself for a position, that is addressed by §19A-14(a).

reflect the essential duties of the position. The [BCC] has therefore taken steps to reclassify the position so that it will reflect the requirement of a law degree.” The Ethics Commission staff requested from you a characterization of your involvement in the effort the BCC has taken to reclassify the Executive Director. You responded to an email inquiry with an email stating:

My involvement as a [BCC] member has been to review and approve the updated Position Description and memos drafted by [the current Executive Director] concerning trying to get the position reclassified. All these documents were unanimously approved by the [BCC]. I was also present at the GO [Government Operations] Committee meeting where the [BCC] Chair requested additional funding for the position, a request that was also unanimously endorsed by the [BCC], but which the GO Committee did not seem particularly inclined to grant.

As you were involved in the effort to establish the revised position, you could have, at least in theory, guided the process to favor your skills and abilities or sought a classification at a higher pay level or both to make the position more attractive for you to apply for or to increase the likelihood of your selection. This provides the setting for the question you raise of whether you are permitted to apply for the position at all.

It is the sense of the Ethics Commission that it would have been better had you not worked on the attempt to reclassify a position that you would be applying for. Maybe you had not at the time formulated an intent to apply for the position at that time, but in any event, your involvement in the reclassification effort would support the theory iterated above. On the question of whether you are permitted to apply for the position, the conflict of interest provisions in § 19A-11 are focused on action as a Government employee, so, typically, if that section were applicable, a recusal would be a sufficient mechanism to avoid a violation. The misuse provision in § 19A-14(a) does not focus entirely on official actions of Government employees: it is equally applicable to acts in a private capacity that take advantage of one’s Government position to advance one’s personal interests. So it could apply to a Government official’s private action if that action were deemed to be taking advantage of the official’s position for private gain. If a person were no longer a government official, a private action could not fall under either §§ 19A-11 or 19A-14(a) because those provisions only apply to County employees. Therefore, if you were a private citizen at the time of the application with no affiliation with County government, there is no provision in the Public Ethics Law that would prohibit your application for the Executive Director position.<sup>2</sup> In that instance, the burden of conducting and possibly defending the selection process for the Executive

---

<sup>2</sup> There are certain restrictions on post-employment activities in §19-13 of the Public Ethics Law, but since the position you would be applying for would be with a County agency, those post-employment restrictions would not be applicable.

Director would fall on the Office of Human Resources and, ultimately, the remaining members of the BCC.

The last question you pose is whether, if you recuse yourself from the selection process, decision, and all other matters associated with the hiring, whether you might remain a member of the BCC pending the selection process. For the reasons that follow, the Ethics Commission concludes that if you intend to apply for the vacant position, you should immediately resign from the BCC.

Section 19A-14(a) provides: “A public employee must not intentionally use the prestige of office for private gain or the gain of another . . . .” From the perspective of the Ethics Commission, an employee’s mere applying for a position where the employee’s experience and qualifications are well known to those making the hiring decision does not in itself offend the misuse of prestige of office provision. That a person applying for a position has worked with persons making the hiring decisions is a routine occurrence.

What makes the current circumstance different from that routine circumstance is your membership in the BCC that will be making the decision to fill the vacancy. This membership on the BCC evokes the misuse of prestige of office even where you would be recused from participation as a Government official in the selection process. While applying for the position would be a private action that any person could take, in your case, as a member of the BCC, it would be an action that is inherently related to your official duties and your position. Your continued membership on the BCC while applying for the vacant staff position might create circumstances that could interfere with normal BCC operations, such as creating awkwardness in addressing routine BCC affairs. For example, would a BCC member who is applying for the staff job be as aggressive with respect to other matters before the BCC in staking out positions different from other BCC members when the other BCC members are confronting the hiring decision? Also, would the BCC members making the hiring decision be concerned that if they did not hire the other BCC member that they would have to continue working as colleagues on the BCC having rejected the member/applicant as being other than the best candidate to act as staff for the BCC? This could twist the incentives for the other BCC members in rendering the selection decision. The Commission presumes that there are any number of dynamics that it cannot divine that would be created by your continued presence on the BCC when the BCC is filling a position for which you would have applied.

The Ethics Commission therefore advises that if you intend to apply for the vacant BCC staff position, you should immediately resign your position as a BCC member.<sup>3</sup>

---

<sup>3</sup> The Commission notes that your letter details elements of the hiring process that could be viewed as shielding the BCC from any notion of conflict of interest as regards some of the preliminary decisions in the identification and narrowing of qualified candidates. However, the hiring decision distinguishing among the best qualified candidates is that of the BCC, and the effectiveness of the process as a shield against any conflict could only be relevant if you were

[This opinion has been edited to protect the personal privacy  
of the person who requested the opinion.]

For the Commission:



---

Nina A. Weisbroth, Chair

---

non-selected as best qualified. The Ethics Commission cannot presume in rendering its opinion that that will occur.

**Montgomery County Ethics Commission**

---

100 Maryland Avenue, Room 204, Rockville, MD 20850  
OFFICE 240-777-6670, FAX 240-777-6672